U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 0 8 2010

LIN 06 275 52320

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a software development and service company. It seeks to employ the beneficiary permanently in the United States as a software developer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of work experience stated on the labor certification. Specifically, the director determined that the beneficiary did not possess sixty months of work experience in an alternate occupation as stipulated at Item H, line l0 of the certified ETA Form 9089.

On appeal, counsel states that the director misread the petitioner's job requirements as set forth on Section H, of the ETA Form 9089. Counsel states that the petitioner states on the ETA Form 9089 in Section H, line 4, that the minimum education required for the proffered position is a Master's degree and that in Section H, line 6, the petitioner states that no experience in the job offered is required. Counsel further notes that the petitioner states in Section H, line 8-A and C that a bachelor's degree and sixty months or five years of work experience in the proffered position is the acceptable alternative combination of education and experience. Counsel also notes that in Section H, line 10, the petitioner indicates that the beneficiary's five years of prior experience in an alternate occupation was also acceptable.

Counsel submits copies of the petitioner's recruitment materials, including the internal posting and the prevailing wage determination for the proffered position. Counsel notes that both these documents indicated that a master's degree in computer science or engineering or business was required, but not a master's degree in these three fields plus work experience.[1] Counsel submits a copy of an unpublished AAO decision involving a employment-based visa petition for a professional or skilled worker. Counsel also cites *Grace Korean United Methodist Church V. Chertoff,* 437 F. Supp 2d 1174 (D. Or. 2005) for the proposition that deference should be given to an employer's interpretation of its own requirements on the labor certification, particularly when there is secondary evidence such as PERM supporting documentation to establish the petitioner's intent.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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[1] Counsel also submits copies of the petitioner's newspaper advertisements, the contents of which are illegible. Counsel also submits a copy of the petitioner's online job advertisement format, with no specific reference to the proffered position and the petitioner's advertised education and work experience requirements. The AAO does not view these materials as persuasive of the petitioner's intent with regard to the required minimum level of education based on their lack of specificity or legibility.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). On appeal, counsel refers to a decision issued by the AAO concerning the interpretation of the phrase "bachelor's degree or equivalent," but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO would further note that the unpublished decision concerned petitions involving professionals or skilled workers, and the AAO ultimately determined that the proffered position could be considered a skilled worker.

In the instant petition, the minimum requirements reflected in the certified ETA Form 9089 are a master's degree in computer science or any engineering or business, or a bachelor's degree with five years of work experience. With the I-140 petition, the petitioner submitted a copy of the beneficiary's Master's of Science degree dated May 16, 2004, from Marquette University, an accredited university in the United States. The petitioner also submitted the beneficiary's transcripts of coursework that reflects the beneficiary's studies in computer studies.[3] Section H, Line 4-b, of the ETA Form 9089 describes the petitioner's required major fields of study as "Computer science, or any engineering, or business." As such, the beneficiary's studies are in one of the major field of studies. Thus, the beneficiary is eligible for classification sought.[4]

With regard to the director's determination that the petitioner did not establish that the beneficiary had 60 months or five years of work experience in an alternate occupation, the AAO notes that the ETA Form 9089 at Section H, line 6 indicates that no experience is required for the proffered job. Thus the petitioner has established that the beneficiary meets the job requirements as stipulated on the ETA Form 9089.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden. The director's decision is withdrawn.

ORDER: The appeal is sustained.

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[3] The beneficiary's transcripts from Marquette establish that his classes were in computer architecture, software engineering, computer science and biomed engineering, among other topics.

[4] The AAO notes that the director in his decision did not question whether the beneficiary possessed a Master's degree in one of the fields stipulated on the ETA Form 9089.